UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

BERKSHIRE NURSING HOME, LLC

and **Case No. 29-CA-26082**

NEW YORK'S HEALTH & HUMAN SERVICE UNION, 1199, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Emily DeSa, Esq., Counsel for the General Counsel
Aaron Schlesinger, Esq., Peckar & Abramson, Counsel for the Respondent.
Adam Rhynard, Esq., Levy, Ratner & Behroozi, Counsel for the Charging Party.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on October 19, 2004 in Brooklyn, New York. The Complaint herein, which issued on July 22, 2004[1] and was based upon a charge and an amended charge filed on January 27 and July 20 by New York's Health & Human Service Union, 1199, Service Employees International Union, AFL-CIO, herein called the Union, alleges that Berkshire Nursing Home LLC, herein called Respondent, violated Section 8(a)(1)(5) of the Act by instituting two changes in its employees' terms and conditions of employment, where they were permitted to park and the cost of, as well as their choice of, health insurance coverage, without prior notice to, or bargaining with, the Union.

I. Jurisdiction

The Respondent admits, and I find, that it has been a healthcare institution within the meaning of Section 2(14) of the Act, and has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

Pursuant to a petition filed by the Union on October 9, 2003 and a Stipulated Election Agreement entered into by the Union and the Respondent, an election was conducted on November 5, 2003 among the employees in the following agreed upon unit:

> All full-time and regular part-time non professional employees including the classifications of Licensed Practical Nurses, Certified Nursing Assistants, Maintenance Workers, Recreational Aides, CNA/Therapy Aides, Cooks, Dietary Workers and

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2004.

> Housekeeping Workers employed by the Employer at its 10 Berkshire Road, West Babylon, New York facility, but excluding all Registered Nurses and other professional employees, Receptionists, Medical Records personnel, Nursing Secretary and other business office clerical employees, confidential employees, guards, LPN Nursing Care Coordinators, Shift LPN Charge Nurses, Administrators, Physical Therapy Assistants, Managers and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots showed that 110 votes were cast in favor of the Union, 20 votes were cast against the Union, and there were 9 challenged ballots, a number insufficient to affect the results of the election. On November 12, 2003 the Respondent filed objections to the election and on December 3, 2003, the Regional Director issued a Report on Objections wherein he recommended that the objections be overruled in their entirety and that a Certification of Representatives issue certifying the Union as the collective bargaining representative of the employees in the unit described above. The Respondent filed exceptions to the Regional Director's Report and on January 14, the Board issued a Decision and Order Directing Hearing adopting the Regional Director's findings except that it found that the Respondent's Objection 2(c) raised substantial and material factual issues warranting a hearing and ordered that a hearing be held to receive evidence on that one objection. On February 9, a hearing was held on the remaining objection and on February 27 I issued a Recommended Decision on Objections wherein I recommended that the Respondent's remaining objection be overruled, and the Union be certified as the collective bargaining representative of the employees referred to above. By Decision and Certification of Representative dated May 21, the Board adopted my findings and recommendations, and certified the Union as the collective bargaining representative of these employees.

The Respondent has two parking lots at its facility, the south or rear parking lot and the east or side parking lot and there was no restriction on where the employees could park their cars. The employees preferred the rear parking lot because there is a direct entrance into the facility from that lot, while the side parking lot does not have such a direct entry into the building. Employees also parked on the streets adjoining the facility. On December 24, 2003, the Respondent, by William Cowen, its administrator, sent the following memorandum to all of its employees:

> EFFECTIVE JANUARY 2, 2004, starting with the morning shift, employees will not be permitted to park in the back parking lot (entrance on Little East Neck Road). Employees who choose to park on Berkshire property can park in the lot at the East end of Berkshire Road.
>
> The lighting in that area, which is also to be used by Visitors (there are some designated spots for them), has been improved. Security assistance will be provided at the change of shifts at midnight. New lines will be painted when the weather permits.
>
> This change has been made to facilitate deliveries and ambulance drop-offs and pick-ups and will also end the serious potential for accidents and blocking of cars that occurred in the back with all the congestion. There will be reserved parking in the back for designated staff and owners. The area that will now be empty will eventually become an area designated for resident/family use.
>
> We urge your compliance with this new procedure. Town-permitted street parking remains available to you.

On April 28, the Respondent changed this rule to allow employees working on the night shift

(12:00 midnight to 8 a.m.), as well as specified staff members on the day shift, to park in the rear parking lot.

Employee Angela Bollerup testified that there was a back entrance to the facility "right there" at the rear parking lot and it only took her about one minute to walk from her car to the building. Now that she has to park in the side parking lot it takes three to five minutes to get to the facility. Prior to January 2 she parked in the side lot only when there were no spaces available in the rear lot, approximately five to ten times during her seven years of employment with the Respondent. Prior to January 2, she noticed overcrowding and blocked cars in the rear parking lot. In addition, she testified the Respondent has not cleared the snow "right away" from the side parking lot and she has seen fellow employees fall and get hurt walking in the side parking lot, although she did not feel unsafe parking in the side lot. Cowen testified that prior to January, the Respondent had no policy regarding where employees could park: "Employees could park wherever they felt they wanted to park, either lot or on the street." He testified that since he began working for the Respondent in 2000 he observed that there were a lot of problems caused by the employees' preference for the south lot: congestion, blocking of cars, double parking and accidents. He had complaints from vendors and ambulance drivers that they had difficulty getting into and out of the facility because of the congestion, causing him to go to the parking lot to inspect the situation and/or make announcements over the loudspeaker for employees to move their cars. In addition, he found that some employees on the day shift parked their car illegally in the south lot, kept the motor running, and, after the change in shifts, went out to their car and parked it in a newly opened parking space, thereby leaving their work stations. Because of these problems, he issued the December 24, 2003 memo restricting parking. The Respondent has a contract for snow removal that clears the snow from both parking lots, one following the other.

Since March 1, 2003 the Respondent's employees had their healthcare coverage through HIP. By memo dated January 26 to all eligible employees, Cowen wrote:

> Each year we evaluate our health insurance plans and the benefits provided to our eligible employees. Over the past several months, we have reviewed alternative plans from other insurers to determine which plans best suited our eligible employees. This year HIP requested a 13.7% increase to our current medical rates. We understand your concerns with the current HIP plan and rather than transfer completely from HIP and disrupt those employees that are satisfied with the network and service, we have decided to offer you three different plan options. The current HIP plan will be offered in addition to a Buy-Up HIP HMO plan and a Buy-Up Empire Direct HMO plan. Empire has the largest network of doctors and hospitals in the area.
>
> <u>Plan Designs</u>
> Every eligible employee will have the option to select one of three plans. The Core HIP plan is the same as the current plan design. The Buy-Up HIP plan has a different drug card that has no deductible and allows non-formulary drugs for a $35 copay rather than a 50% copay. Unlike the HIP Core and Buy-Up plan, Empire's HMO plan is open access and does not require you to get a referral before seeing a specialist. Empire also allows non-formulary drugs to be received via the mail order program. The three plan designs are as follows:
>
> [Description of the three available plans]

Prior to the change, Bollerup had $26.79 deducted from her weekly paycheck to cover her contribution for her health care coverage. After the change, the amount deducted from

Bollerup's weekly paycheck for the same HIP coverage was $35.44. The parties stipulated that prior to the issuance of the December 24, 2003 and January 26, 2004 memos to the employees, the Respondent did not notify or bargain with the Union about the subjects of employee parking or health care coverage.[2]

Cowen testified that the Respondent revises its health insurance plans on a yearly basis. It employs a broker who reviews its health insurance plan and compares it with other available plans. Because of increased costs, the Respondent changed its coverage to HIP in March 2003. The January 26 memo to the employees was necessitated by the fact that costs for HIP coverage over the prior year had increased by 14%. Employees were given the choice of keeping their existing HIP coverage, but with an additional premium, or changing coverage. The new health coverage took effect on March 1. The Union never requested bargaining on this subject or the restrictions on parking in the rear parking lot.

IV. Analysis

There are three distinct issues herein: did the two issues involved herein, parking lot privileges and health insurance costs, constitute mandatory subjects of bargaining? Can an employer lawfully make unilateral changes in its employees terms and conditions of employment after a union was successful in a Board conducted election, but prior to a Board certification? And did the Union waive the right to bargain about these two subjects?

In *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (DC Cir. 1992), the Court stated:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." [citation omitted]

In *Mercy Hospital of Buffalo*, 311 NLRB 869, 872 (1993), the Board found that the employer violated Section 8(a)(5) of the Act by unilaterally eliminating its 2 a.m. to 4 a.m. cafeteria hours on weekends (citing *Ford Motor Co. v. NLRB*, 441 U.S. 448 (1979)), because this service was "germane to the working environment." Clearly, the change in health insurance coverage that the employees were notified of on January 26 was a mandatory subject of bargaining, and the change violated the Act because the employees who continued with HIP coverage had to pay more for the same coverage, after the change. *Pilgrim Industries, Inc.*, 302 NLRB 591 (1991) and *Valley Counseling Services, Inc.,* 305 NLRB 959, 960 (1991).

The change in parking rules at the facility, effective January 2, is a closer issue. I found Cowen and Bollerup to be a credible and believable witness herein. The bottom line is that the employees on the day shift who had to park in the east parking lot had an extra two to four minute walk to get to the building entrance as compared to when they parked in the south parking lot prior to January 2. In *United Parcel Service*, 336 NLRB 1134 (2001), the employer operated a facility at the Oakland airport, which it leased from the Port of Oakland, and the employer's employees parked at a parking lot owned by the Port. The lot was about a five

[2] The transcript incorrectly states (at p. 26, lines 11 and 13) that, prior to making these changes, the employee did not notify the Union. The stipulation was, and should state, that the employer did not notify the Union prior to making these changes.

minute walk from the employer's facility. The Port closed that parking lot and notified its tenants, including the employer, that their employees would have to park at a new facility, about a mile and a half from the employer's facility. The Port operated shuttle buses every 15 to 20 minutes to and from this new parking lot, requiring the employer's employees to spend up to an additional 20 minutes to get to and from the employer's facility and their cars. The employer, which had no role in the relocation of the parking lot, subsequently notified the employees of the change and that it could do nothing to prevent the change. The Board found that employee parking was a mandatory subject of bargaining, and since the change added an additional 40 minutes to the employees' commuting time, the change had a "substantial impact upon the terms and conditions of employment" which "resulted in material changes to the employees' conditions of employment" in violation of Section 8(a)(5) of the Act. On the other hand, in *Advertiser's Manufacturing* Company, 280 NLRB 1185, 1193 (1986), cited by counsel for the Respondent and counsel for the Charging Party in their briefs, Administrative Law Judge Richard Scully, found that a unilateral change that prohibited employees from parking in the first row of the employee parking lot, did not violate the Act, because it "...at most, required a few employee to walk a few extra yards from their cars to the plant..." See also *Frank Leta* Honda, 321 NLRB 482, 496 (1996) and *Dynatron/Bondo Corp.*, 324 NLRB 572, 578 (1997). The instant situation falls right between UPS and Advertisers. Although the change in parking rules herein was not as substantial or material as in *UPS*, the fact that the employees clearly favored the rear parking lot indicates that it was a material and substantial unilateral change in terms and conditions of employment for these employees, and therefore violated Section 8(a)(1)(5) of the Act.

As regards the Respondent's defense that the Union had not been certified by the Board at the time these changes were made, there are numerous Board cases rejecting such a theory, such as *United Food and Commercial Workers, Local 1996 (Visiting Nurse Health System, Inc.)*, 336 NLRB 421, 428, which stated: "the Board has long held that an employer's obligation to bargain attaches at the time the union wins the election, and that the employer acts at its peril when it makes unilateral changes while post election proceedings are pending." The "acts at its peril" language appears in many Board decisions. Finally, Respondent defends that because the Union never requested bargaining about these subjects, it waived the right to bargain about them. In *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 at 1017 (1982), Administrative Law Judge Julius Cohn, as affirmed by the Board, stated:

> The other aspect of the waiver issue arises from Respondent's contention that the Union waived its right to bargain over the changes simply because it failed to request bargaining. The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*.

In *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), the Court stated: "a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*." That is precisely the situation herein. The employees were given notice on December 24, 2003 (for the parking change) and January 26 (for the health insurance change) of the changes that the Respondent was instituting. These notices did not say that the Respondent was considering these changes, which would have afforded the Union an opportunity to request bargaining and propose alternatives. Rather, these notices notified the employees that on the effective date these changes would take effect. Each was a *fait accompli* with no opportunity or

offer to bargain. I have no doubt that the change in parking rules was promulgated for valid business and safety reasons, and the change in health insurance providers and costs was made due to the cost increases in HIP coverage. However, what Respondent should have, but did not, do was to offer to discuss these subjects with the Union, rather than simply implementing them. By changing the parking rules effective January 2, and by changing its employees' health care coverage and/or the cost of the coverage, effective March 1, the Respondent violated Section 8(a)(5) of the Act.

Conclusions of Law

1. The Respondent has been a healthcare institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally restricting its employees' right to park in its rear parking lot, and by unilaterally forcing its employees to pay a higher weekly contribution for their health insurance or, in the alternative, to choose from three health insurance plans, the Respondent violated Section 8(a)(1)(5) of the Act.

The Remedy

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1)(5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. As the Respondent unlawfully unilaterally restricted employees use of the rear parking lot effective January 2, I shall recommend that the Respondent be ordered to withdraw this change, and to bargain with the Union about this subject prior to implementing any changes in parking rules. As the Respondent unlawfully unilaterally changed the health care options available to its employees, as well as the costs of the HIP coverage employed by its employees, I shall recommend that the Respondent rescind this change and bargain with the Union about this subject prior to making any change therein. Respondent shall also reimburse its employees for the additional costs they had for the HIP coverage after March 1 or for any other costs that they suffered as a result of this unilateral change.

On these findings of fact and conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Berkshire Nursing Home LLC, its officers, agents, successors and assigns, shall:

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Unilaterally changing the terms and conditions of employment of its employees represented by the Union, without notifying and bargaining with the Union about these subjects.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore the employees' right to park in the parking lot of their choosing, and rescind the additional charge for HIP health care coverage that was effective March 1, and bargain with the Union prior to changing these, or other terms and conditions of employment, of the employees represented by the Union.

(b) Make whole its employees for the additional cost for their HIP health insurance coverage, or for any other costs that they incurred that were caused by this change.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement to the unit employees due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in West Babylon, New York copies of the attached Notice marked "Appendix."[4] Copies of the Notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since December 24, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C.

_____

Joel P. Biblowitz
Administrative Law Judge

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to meet and bargain with New York's Health & Human Service Union, 1199, Service Employees International Union, AFL-CIO, regarding our unilateral decisions to restrict our employees' parking privileges, to change their health care coverage, and the costs thereof, or any other term or condition of employment of these employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate our past practice allowing our employees to park in either of our parking lots, **WE WILL** withdraw the increased premiums our unit employees were charged for HIP health care coverage effective March 1, 2004, and **WE WILL** reimburse our unit employees for the extra costs they incurred that were caused by these changes in their health care coverage.

BERKSHIRE NURSING HOME LLC
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor, Brooklyn, NY 11201-4201

(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.